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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF AMICI CURIAE OF WINDFARMS, LTD.; UNITED TECHNOLOGIES CORPORATION, HAMILTON STANDARD DIVISION; KERR-McGEE CHEMICAL CORPORATION; AND GREAT WESTERN MALTING COMPANY

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BRIEF AMICI CURIAE

INTEREST OF *AMICI*

Pursuant to Rule 36.2 of the Rules of this Court, Windfarms, Ltd. ("Windfarms"); United Technologies Corporation, Hamilton Standard Division ("Hamilton Standard"); Kerr-McGee Chemical Corporation ("Kerr McGee"); and Great Western Malting Company ("Great Western") respectfully submit this brief *amici curiae* in support of appellants Federal Energy Regulatory Commission ("FERC" or "the Commission") and the Secretary of Energy. Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court.

Windfarms is a child of the national energy crisis. Its founders responded to the incentives for wind energy and other innovative and renewable resource technologies created by the Public Utility Regulatory Policies Act of 1978, P.L. No. 95-617, 92 Stat. 3117 *et seq.* ("PURPA"), one of the five parts of the National Energy Act, and established Windfarms for the purpose of developing

commercial wind energy projects that would generate electricity for sale to utility companies.

As far as it is aware, Windfarms is the largest developer of commercial, wind-powered electric generation in the United States; its goal is to have 1000 megawatts of wind-powered generating capacity in place by 1990. Windfarms is in the process of developing several substantial projects, the first of which will consist of approximately twenty windmills, each of four-megawatt capacity, to be located on different sites over 2,100 acres at Kahuku Point on the north shore of the Island of Oahu. The facilities' aggregate capacity of 80 megawatts represents approximately 8.5% of the current needs of the City of Honolulu and Oahu.[1]

Hamilton Standard is a long time designer, developer and manufacturer of high technology products for the aerospace, automotive, and industrial markets. It has recently expanded its activities to include large (3 to 4 megawatt) wind turbine systems for the generation of electricity. Building from its existing technology base, Hamilton Standard has invested over $15 million in engineering design and facilities for the development of utility-scale wind turbine systems and is currently participating in the design and manufacture of two large wind turbine

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[1] Hawaiian Electric Company has already agreed to purchase the power generated by the Kahuku facility, and the project has been certified by FERC as a qualifying small power production facility under Section 210 of PURPA, 16 U.S.C. § 824a-3 (Supp. III 1979), and the regulations promulgated thereunder. *See* Order Granting Application for Certification as a Qualifying Small Power Production Facility and Granting Waiver, Docket No. QF 80-13 (FERC, Oct. 3, 1980). Windfarms is currently in the process of raising the large amount of capital needed to construct the Kahuku project. The company has also reached agreement with Pacific Gas and Electric Co. for development of facilities at different sites, including a wind-powered project to be located east of San Francisco with an aggregate capacity of 350 megawatts, and is currently engaged in site acquisition and negotiations with utilities for several other large projects in Southern California and the power-short Pacific Northwest.

systems which will be operational in the next few months. Hamilton Standard is also working with Windfarms to develop the Kahuku Point project referred to above, and is in the process of expanding its wind turbine system manufacturing facilities. The basis for this strong commitment to wind energy is the near-term market potential in the United States fostered by PURPA and the long-term potential of worldwide markets for high technology energy products.

Great Western manufactures barley malt, a prime ingredient of beer. It is planning to install natural gas-fired combustion turbines, similar to commercial jet aircraft engines, at its malting facilities in Vancouver, Washington and City of Commerce, California. The turbines would generate approximately 20.1 megawatts of electricity at Vancouver and approximately 7 megawatts at City of Commerce. In each case, heat from the turbine's exhaust, which otherwise would simply be released into the atmosphere, will be used to create hot air that is drawn through beds of malt to dry it. Except for maintenance periods, Great Western expects to operate the turbines 24 hours a day, 365 days a year, and they are expected to be at least as reliable as most utility-owned generating equipment. Great Western plans to sell all of the electric power output of the turbines to an electric utility, and it will buy from the utility the power needed for its own facilities, about one fifth of the amount it generates.[2]

Kerr-McGee is already cogenerating [3] electricity at three chemical manufacturing plants in the Searles Valley

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[2] At Vancouver, Great Western's electricity will assist in that region's particular effort to develop additional efficient sources of power. *See* Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C.A. § 839 (West Spec. Pamphlet 1980). In Southern California, Great Western will probably sell its output to Southern California Edison Co., currently one of the largest purchasers of fuel oil in the United States.

[3] Cogeneration is the sequential production of "electricity energy and steam or forms of useful energy (such as heat) which are

area of San Bernardino County, California. Its Trona/Argus and Westend facilities produce basic bulk chemicals essential to California's huge agricultural industry. Kerr-McGee's manufacturing processes require substantial amounts of energy to produce steam used to power turbines, which in turn power electric generators or mechanical drives (e.g., fans, compressors, or pumps); the exhaust steam is then used in Kerr-McGee's industrial process.

Kerr-McGee's Trona/Argus cogeneration system generates approximately 49 megawatts of electric power, as well as some 30,000 horsepower of mechanical power. All of the electrical output of the Trona/Argus facility is presently used within the facility itself, thereby reducing demand on the serving utility by that amount, but Kerr-McGee is considering modifications that would permit the Trona/Argus facility to generate 7 to 8 megawatts of power over and above its needs. At Westend, Kerr-McGee generates, in addition to steam, an average of 12 megawatts of electricity for the facility's own use plus 3 to 5 megawatts of surplus power.[4]

Amici's efforts to develop additional efficient electric generating capacity are threatened, however, by the decision of Judge Harold Cox of the United States District Court for the Southern District of Mississippi that Title I, Title III, and Section 210 of PURPA impermissibly infringe the State of Mississippi's regulatory authority over utilities operating within the State. Citing the Tenth Amendment, the Supremacy Clause,

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used for industrial, commercial, heating, or cooling purposes . . . ." PURPA § 201, Federal Power Act § 3(18)(A), 16 U.S.C. § 796(18)(A) (Supp. III 1979). Cogeneration allows more efficient use of energy by permitting it to be used for more than one purpose. More "work" is done per unit of energy input, thereby conserving fuels such as oil and natural gas.

[4] On a straight useable output/heat input basis, the Trona/Argus cogeneration cycle has a thermal efficiency ratio of 86% as compared to the 34-37% efficiency of a typical utility plant. The Westend system has a thermal efficiency of 72%.

and Article IV, Section 4 of the Constitution, the district court declared these portions of the statute "unconstitutional and void." [5] Final Judgment at 2, *Mississippi* v. *FERC*, No. J79-0212(C) (S.D.Miss.) *prob. juris. noted*, 49 U.S.L.W. 3930 (1981) (No. 80-1749) ("Final Judgment").

Amici are only several of the many diverse companies that have responded to Congress' call for increased electric energy production by "cogeneration facilities" and "small power production facilities." [6] *See* PURPA § 210. The decision of the district court, if affirmed, would jeopardize Amici's plans for constructing or enlarging cogeneration and small power production facilities, and would, in fact, generally threaten the continued growth of electric power generation through the use of renewable resources such as wind, biomass, waste, and solar energy, and through more efficient use of nonrenewable oil and natural gas.

When it enacted PURPA, Congress recognized that there were three major impediments to increased cogeneration and small power production.[7] First, utilities have historically been reluctant to buy power from cogenerators and small power producers. Second, utilities have charged cogenerators discriminatorily high rates for back-up and supplementary power. Third, people have been

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[5] In this brief, *amici* address only the district court's ruling with respect to Section 210.

[6] A "small power production facility," such as Windfarms' Kahuku project, produces electric energy "solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof. . . ." PURPA § 201, Federal Power Act § 3(17)(A), 16 U.S.C. § 796(17)(A) (Supp. III 1979). Small power producers, in other words, produce electricity entirely without the use of petroleum fuels.

[7] *See* Cogeneration: Hearings Before the Subcomm. on Energy Development and Applications of the House Comm. on Science and Technology, 96th Cong., 2d Sess. 383 (1980) (testimony of John O'Sullivan, Chief Advisory Counsel, FERC); 123 Cong. Rec. S16,481 (daily ed. Oct. 6, 1977) (remarks of Sen. Percy). *Cf. id.* at S16,398 (daily ed. Oct. 5, 1977) (remarks of Sen. Hart).

reluctant to construct qualifying cogeneration or small power production facilities (collectively "QF's") when doing so subjects them to utility-type regulation, including restrictions on the types of activities in which a utility holding company may engage and cost-based rate regulation. *See, e.g.*, Public Utility Holding Company Act § 9, 15 U.S.C. § 79i (Supp. III 1979); Federal Power Act § 205, 16 U.S.C. § 824d (Supp. III 1979). Because QF's, unlike utilities, are not guaranteed a rate of return, they must be given incentives to invest the capital necessary to build, enlarge, and maintain cogeneration and small power production capacity.

Congress designed Section 210 of PURPA to remedy these problems. The Section requires the Federal Energy Regulatory Commission to promulgate rules requiring utilities to buy power from QF's at just and reasonable rates (not exceeding the utilities' incremental or full avoided cost of producing power) and to sell back-up power to QF's at non-discriminatory rates, and it authorizes the Commission to adopt rules exempting QF's from some state and federal regulation normally imposed on electric utilities.

Section 210 has had the desired effect. Its assurances of a fair market for QF-generated electric power, without burdensome regulation, have given birth to an entire industry. Scores of small power producers like Windfarms and suppliers like Hamilton Standard are planning projects to generate electricity from hydro, geothermal, solar, wind, woodwaste, and biomass sources. And hundreds of companies whose industrial processes require heat, like Kerr-McGee and Great Western, are investigating the feasibility of cogenerating electricity and heat or of increasing their existing cogeneration capacity.[8]

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[8] In 1980 one utility alone signed contracts or letters of intent for 229 megawatts of power from cogeneration, biomass and hydroelectric sources. Cal. Public Utilities Commission, Staff Report on the Cogeneration and Small Power Production Program of Pacific Gas and Electric Co., Test Year 1982, at 2 (April 17, 1981). Moreover, between March 1980, when its regulations became effective, and

By declaring Section 210 void in its entirety, the district court has jeopardized these desirable developments.[9] The pall cast by the lower court's decision comes at a particularly inopportune time for Amici and others interested in developing QF's; only today, some two and a half years after passage of PURPA, have projects advanced to the point where developers who responded to Congress' call have completed the necessary feasibility and engineering studies and are prepared to raise or commit the capital needed to begin actual construction of new generating facilities.

A declaration by this Court of the continued validity of Section 210, or at least of portions of it, is essential to assure investors and developers that these projects will be economically viable and will be able to avoid burdensome utility-type regulation. Affirmance of the district court's judgment, on the other hand, would delay or seriously jeopardize the development of many potential qualifying facilities. Indeed, while industrial facilities would presumably continue to produce their normal products even without the incentives created by Section 210, affirmance of the district court decision would seriously cripple or eliminate altogether small power producers,

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June 1981, FERC received 59 notices and applications for certification as a QF, representing a total generating capacity of approximately 1600 megawatts. Cogeneration: Hearings on the Role of Utilities in Cogeneration and Small Power Production Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (June 3, 1981) (unpublished) (testimony of John O'Sullivan, Chief Advisory Counsel, FERC, at 4-5) ("O'Sullivan Testimony")

[9] The [FERC] staff believes that [the district court decision] has created a chilling effect for persons interested in developing cogeneration or small power production by increasing the risk of success for any such project. . . . For this reason, financial institutions that might lend money to potential small power producers and cogenerators are hesitant to get involved in such projects until the litigation surrounding the program is ultimately decided." O'Sullivan Testimony at 3. *Cf.* Wall Street Journal, Aug. 21, 1981, at 21, col. 1 ("If [Section 210] is voided, it would reduce incentive to build wind turbines because utilities probably wouldn't buy any excess output voluntarily.")

whose only product is electric energy derived from renewable resources and who depend upon Section 210 to ensure that there is a fair market for their electrical output.

SUMMARY OF ARGUMENT

Section 210 of PURPA is unquestionably a valid exercise of Congress' power under the Commerce Clause, which reaches activities that are in interstate commerce, substantially affect interstate commerce, or whose regulation is necessary to effectively regulate interstate commerce. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 49 U.S.L.W. 4654, 4656-59 (1981). Congress' authority under the Commerce Clause extends even to sales of electrical energy whose connection to interstate commerce is remote or fleeting. Because every utility in the continental United States (except for those in Texas) is a part of the national grid, all of the transactions regulated by Section 210 not only substantially affect interstate commerce but are, in fact, in interstate commerce.

Section 210 does not violate the States' Tenth Amendment rights for two reasons. First, and as a threshold matter, there has been no showing that Mississippi's claim meets any part of the three-part test established by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and articulated most recently in *Hodel*, 49 U.S.L.W. at 4660. Thus, Section 210 does not regulate the "States as States", both because it is ultimately directed at the regulation of private, proprietary endeavors rather than state activities or functions, and because it would be anomalous, and inconsistent with the thrust and purpose of the Tenth Amendment, to hold that while Congress may preempt state authority in an area, *see Hodel*, 49 U.S.L.W. at 4660, it is precluded by the Tenth Amendment from giving the States a voice in matters of overriding national importance but undeniable local effect. Moreover, the power to regulate electric utilities is not an "attribute of sovereignty" because the area is one in which the States have traditionally shared regulatory power with the federal government. Finally,

Section 210, which is implemented by existing regulatory authorities, does not affect the structure of state operations.

Even if Mississippi were able to make the required three-part showing, Section 210 would survive Tenth Amendment scrutiny because the Federal interest promoted by the statute is demonstrably great; without a national program and national standards, the United States will be unable to protect its vital interests in secure, ample and economic energy sources. In enacting Section 210, Congress took steps to address problems that threaten the efficient and economic provision of electric energy to American homes and industry. Consequently, even if Section 210 could be said to interfere with "sovereign" functions of the State of Mississippi, the Federal interest at stake is sufficiently important to defeat the State's Tenth Amendment challenge.

Finally, if the Court should find unconstitutional those provisions of Section 210 that require States to implement federal standards, which it should not, the invalid portions of the Section should be severed and the majority of Section 210's provisions should be upheld. Most of the Section's provisions, including those that authorize FERC to exempt QF's from state and federal utility regulation and that require utilities not regulated by the States to comply with FERC's rules, do not even arguably "commandeer" state authority. These provisions are, in and of themselves, "fully operative as a law", and would further the goals of PURPA without distorting Congress' intent.

ARGUMENT

I. SECTION 210 OF PURPA IS UNQUESTIONABLY WITHIN CONGRESS' POWER TO REGULATE COMERCE.

Electric energy's place in interstate commerce has been recognized for over half a century. *See Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927). Not surprisingly, therefore, the authority

of FERC (and of its predecessor, the Federal Power Commission) to regulate interstate and wholesale sales of electrical energy has been repeatedly upheld by this Court and is now beyond constitutional question. *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 529-30 (1945); *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61 (1943). The Commission's authority is preeminent even when extended to transactions previously regulated by state commissions, *Federal Power Commission* v. *Southern California Edison*, 376 U.S. 205, 206-207, 215-216 (1964), or to transactions whose connection to interstate transmission is remote or fleeting. *Jersey Central Power & Light Co.*; *Florida Power & Light Co.*; *Connecticut Light & Power Co.*, 324 U.S. at 535-36.

Section 210 requires the Commission to promulgate rules requiring electric utilities to (1) offer to purchase electric energy from qualifying cogenerators and small power producers and (2) sell back-up power to such facilities on a non-discriminatory basis. It also authorizes the Commission to exempt QF's from certain state and federal regulation. All of these provisions are within Congress' power under the Commerce Clause.

The sale of power by a cogenerator or small power producer to a utility is a wholesale transaction because the utility does not "use" the purchased energy but resells it to its customers. 16 U.S.C. § 824(d) (1976). Regulation of wholesale transactions between a QF and an electric utility is thus indistinguishable from the federal regulation of wholesale transactions between utilities that was expressly approved in *Florida Power & Light Co.* and *Jersey Central Power & Light Co.*

The requirement that utilities sell electricity to qualifying cogenerators and small power producers at just and reasonable rates, *i.e.*, that they treat their QF customers in the same way that they treat their other customers, is also within Congress' power, both because such sales are

in interstate commerce and because they must be regulated in order to effectuate federal regulation of interstate commerce. Sales of electricity by utilities are in interstate commerce because every power company in the continental United States, excluding those located in Texas, is connected to the interstate grid, and sales of electricity across state lines are frequent, routine, and essential. The nation has a single, integrated electric generation and transmission system, and it is literally true that:

> If a housewife in Atlanta . . . turns on a light, every generator on Florida's system almost instantly is caused to produce some quantity of additional electric energy which serves to maintain the balance in the interconnected system . . . .

Florida Power & Light Co., 404 U.S. at 460. Regulation of this network, and its component parts, is unquestionably within the reach of Congress' authority under the Commerce Clause. *Id.; Connecticut Light & Power Co.*, 324 U.S. at 529-30.

Moreover, had Congress required only that electric utilities purchase energy generated by QF's, the statute would have been incomplete as remedial legislation. Utilities would have been able, for example, to decline unilaterally to provide backup power to QF's, and QF's would have been subjected to burdensome regulation, thereby frustrating their development and nullifying the entire statutory scheme. It is well established that the broad powers granted Congress by the Commerce Clause reach not only activities that substantially affect interstate commerce but also activities whose regulation by the federal government is necessary to effectuate regulation of interstate commerce. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 49 U.S.L.W. 4654, 4656-59 (1981) ("Hodel"), and cases cited therein. This is particularly true when, as is here the case, the avowed purpose of the regulation is to prevent or remedy problems that affect the entire nation. *See* pp. 19-21, *infra*.

II. SECTION 210 OF PURPA DOES NOT IMPROPERLY INFRINGE STATE SOVEREIGNTY IN VIOLATION OF THE TENTH AMENDMENT.

The District Court held that Section 210, *inter alia*, constitutes "a direct intrusion on integral and traditional functions of the State of Mississippi and violate[s] the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause and a republican form of government as guaranteed by Article IV, Section 4 . . ." Final Judgment at 1-2.[10] This holding is inconsistent both with *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the case principally relied upon by the district court, and with this Court's decisions last term in *Hodel* and *Hodel* v. *Indiana*, 49 U.S.L.W. 4667 (1981).

Mississippi's challenge to Section 210 of PURPA does not meet the threshold requirements for such challenges established in *National League of Cities* and *Hodel*. Even if it did meet those requirements, the State's attack would fail because the federal interest served by Section 210 is sufficiently important to "justify state submission." *Hodel*, 49 U.S.L.W. at 4660 n.29. The judgment of the district court should therefore be reversed.

A. Mississippi Has Not Met The Threshold Requirements Established By This Court For Tenth Amendment Challenges To Congressional Commerce Power Legislation.

Less than three months ago this Court articulated the threshold requirements that must be met by claims that federal Commerce Clause legislation conflicts with the Tenth Amendment:

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[10] The Supremacy Clause provides no colorable basis whatsoever for striking down a federal statute because it intrudes upon the functions of a State. And this Court has repeatedly held that challenges to state and congressional action based upon alleged violations of the Guaranty Clause (Article IV, Section 4) are nonjusticiable. *Baker* v. *Carr*, 369 U.S. 186, 218-228 (1962); *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118 (1912).

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Hodel, 49 U.S.L.W. at 4660 (citations omitted). "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements." *Id.* (emphasis in original). Mississippi's claim satisfies none of the requirements, and must therefore fail.

1. There Has Been no Showing that Section 210 Regulates the States as States Beyond Congress' Power to do so.

What constitutes federal regulation of the "States as States" has become unclear over time. It includes the regulation of state governments *per se*, *e.g.*, how much States must pay their employees and how long those employees may work. *National League of Cities.* But it apparently does not include federal preemption of the States' regulation of private industry that is in or substantially affects interstate commerce. *See Hodel*, 49 U.S.L.W. at 4660-61, and cases cited therein.

The questions presented by this case, involving federal efforts to establish minimum standards for state regulation of activities that are in or substantially affect interstate commerce and that have been traditionally regulated by both the States and the federal government, fall between these two extremes. For at least two reasons, however, the law does not prevent, and in fact requires, a finding that the regulatory scheme promulgated in Section 210 does not regulate the States as States.

First, a clear and useful distinction can be drawn between statutes directed at state activities or functions

and statutes whose ultimate object is the regulation of private, proprietary endeavors. *National League of Cities*, 426 U.S. at 845, for example, distinguished "laws regulating individual businesses necessarily subject to the dual sovereignty of the Nation and of the State in which they reside" from "similar exercise[s] of congressional authority directed, not to private citizens, but to the States as States." *Hodel* followed suit. 49 U.S.L.W. at 4659. The argument that, in enacting Section 210, Congress has exercised its powers under the Commerce Clause in a manner forbidden by the Tenth Amendment loses much of its force since (1) the exercise in question is ultimately directed at private parties, primarily electric utilities, and (2) any conflict presented is not with a State's control of its employees or of services it provides to end users, but rather with state regulation of a private activity already under significant federal control.

Second, the invalidation of Section 210 would create an anomalous regime under which congressional displacement of all state regulation in a given area is deemed consistent with the principles of "constitutional federalism" embodied in the Tenth Amendment,[11] but Congress' efforts to share its authority with the States by establishing guidelines or minimum standards and leaving to the States the implementation of programs of both national significance and substantial local effect violate those principles.[12] Mississippi's claim that Section 210 is con-

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[11] *Hodel* squarely held that "nothing in *National League of Cities* suggests that the Tenth Amendment shields the States from preemptive federal regulation of *private* activities affecting interstate commerce." 49 U.S.L.W. at 4660 (emphasis in original). In the words of the Court, "a wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Id.*

[12] The Court apparently alluded to, and sought to avoid, this paradoxical result when it said in *Hodel* that

> Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally

stitutionally infirm thus elevates form over substance and will, if successful, diminish rather than enhance state influence in national affairs.

In Section 210 Congress made a conscious effort to give the States a voice in regulation that is necessarily national in scope. The Section requires FERC to promulgate such rules "as it determines necessary to encourage cogeneration and small power production," and it sets forth certain service requirements and rate parameters. Section 210(a)-210(c). 16 U.S.C. § 824a-3(a)-824a-3(c) (Supp. III 1979). While the States must comply with FERC's standards if they wish to regulate electric utilities within their borders, the Act vests considerable discretion in state regulatory authorities.[18] It would be ironic, and self-defeating, were this Court to hold in the name of state sovereignty that Congress may preempt state regulation in this area but may not, if it wishes to act, give the States an important, albeit subordinate, role.

In short, as in *Hodel* "the most that can be said is that the . . . Act establishes a program of cooperative federalism that allows the States, within limits established by

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suspect simply because Congress chose to allow the States a regulatory role.

Hodel, 49 U.S.L.W. at 4660.

[18] The regulations adopted by the Commission fully reflect the deliberately limited nature of Congress' intervention in state public utility regulation. The rules expressly provide for waiver of most of the Commission's rules under Section 210, including the requirement that a utility purchase electricity from a QF at the utility's incremental or "full avoided" cost, upon application of a state regulatory authority and demonstration that a rule or rate "is not necessary to encourage cogeneration and small power production and is not otherwise required under Section 210 of PURPA." 45 Fed. Reg. 12,237 (1980) (to be codified in 18 C.F.R. § 292.403). The rules leave to the states regulation of QF's constructed before PURPA was enacted. 45 Fed. Reg. 12,235 (1980) (to be codified in 18 C.F.R. § 292.304(b)(3)). And they delegate to state regulatory bodies the authority to resolve the key questions of how reliability, peak period and emergency availability, and the like are to be factored into the prices paid by utilities for power generated by QF's. 45 Fed. Reg. 12,235 (1980) (to be codified in 18 C.F.R. § 292.304(e)).

minimum federal standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel*, 49 U.S.L.W. at 4660. Mississippi cannot therefore meet the first requirement of a claim that Commerce Clause legislation is invalid under the reasoning of *National League of Cities*.

2. Section 210 Does not Address Matters that are Indisputably "Attributes of State Sovereignty."

State regulation of electric utilities is not an "attribute[] of sovereignty attaching to every state government which may not be impaired by Congress." *National League of Cities*, 426 U.S. at 845, *i.e.* a 'function[s] essential to separate and independent existence.' " *Id.*, *quoting Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911).[14] Mississippi's claim therefore fails to meet the second requirement imposed by this Court in *Hodel*.

Sovereignty is "supreme political authority; paramount control of the constitution and frame of government and its administration," *Black's Law Dictionary* 1252 (5th ed. 1979). The "attributes of sovereignty" discussed in *National League of Cities* are therefore powers committed to state authority, free from accountability to the federal government. Regulation of electric utilities, however, has never been so committed. Indeed, it has been a model of joint federal/state regulation since this Court held that the Constitution proscribes state regulation of sales of electricity across state lines, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), and Congress responded by amending the Federal Power Act to exert federal control over such sales. *See Jersey Central Power & Light Co.*, 319 U.S. at 67-68; *Florida Power & Light Co.*, 404 U.S. at 458.

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[14] Mississippi, for example, has been "separate and independent" for nearly two centuries, yet the state itself apparently did not regulate the generation and sale of electricity until 1956. *See* State of Mississippi, Motion to Affirm at 6, *FERC* v. *Mississippi*, No. 80-1749 (Sup. Ct. May 21, 1981).

The States cannot be said to exercise "supreme political authority", and act as sovereign governments when they exercise some authority over an activity that is concurrently regulated by the federal government, *see Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977), and over which the federal government could, if it wished, exercise sole dominion. *Hodel*, 49 U.S.L.W. at 4660-61; discussion at p. 14 n.11, *supra*. As Justice Marshall stated for a unanimous Court in *Hodel*, "there are no Tenth Amendment concerns" when a State challenges a Federal statute "simply as another regulator whose regulatory program has been displaced." *Hodel*, 49 U.S.L.W. at 4661 n.31.

Thus Section 210, far from addressing matters that are "indisputably" attributes of state sovereignty, regulates in a field in which the States are not even arguably "sovereign." Mississippi's challenge to the Section does not, therefore, meet the second requirement of *Hodel* and *National League of Cities*.

3. The States' Compliance with Section 210 would not Directly Impair Their Ability to Structure Integral Operations in Areas of Traditional Function.

Section 210 does not "directly impair" the States' "ability to structure integral operations in areas of traditional function."

The Section does not, in fact, affect the "structure" of State operations at all. Where no State regulatory authority exists or has jurisdiction, the Section acts directly on electric utilities. Where there is a State regulatory authority Section 210 works through it, imposing, in the area of structure or procedure, only the minimal requirement that the authority act "after notice and opportunity for public hearing." [15] No State is required to establish or maintain a regulatory authority if it does

[15] That requirement, in the case of Mississippi, is already imposed by State law. Miss. Code Ann. § 77-3-33 (1973).

not wish to do so, nor to staff, fund or organize its regulatory authority in any particular manner. Thus, Section 210 does not "substantially restructure traditional ways in which [State or] local governments have arranged their affairs." *National League of Cities*, 426 U.S. at 849.

Moreover, the State operations or functions affected by Section 210 are not "integral", at least when that term bears its common meaning: "of, relating to, or serving to form a whole: essential to completeness." Webster's Third New International Dictionary 1173 (1976). The regulation of electric utilities is clearly distinguishable from police, fire, educational and public health services, or the payment of public employees. Broad policy choices involving the purchase and sale of electricity by utilities are simply not "essential decisions regarding the conduct of integral governmental functions." *National League of Cities*, 426 U.S. at 855. Indeed, even were it indistinguishable from such functions electric utility regulation would still not be integral to State operations because, like traffic regulation, it is a "cooperative effort between City, State and federal authorities, with no single entity being able to provide or impose . . . comprehensive [regulations], and with federal power, where necessary, taking precedence." *Friends of the Earth*, 552 F.2d at 38.

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In sum, Mississippi's Tenth Amendment challenge to Section 210 meets none of the threshold requirements established by this Court for such claims, and must therefore be rejected.

B. Even If Mississippi Could Meet All Three Threshold Requirements For A Tenth Amendment Challenge To Section 210, The Section Is Justified By The Nature Of The Federal Interest Advanced.

The deciding vote in *National League of Cities* was cast on the understanding that the Court there adopted "a balancing approach, and does not outlaw federal power in areas . . . where the federal interest is demonstrably

greater and where state facility compliance with imposed federal standards would be essential." *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). *See also id.* at 852-53. Four years later a unanimous Court adopted this view, holding that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel*, 49 U.S.L.W. at 4660 n.29. This is such a situation, and even if the Court were to find that Mississippi's challenge to Section 210 meets all three threshold requirements the decision of the district court should therefore be reversed.

1. Section 210 was Enacted to Meet an "Extremely Serious Problem" That Could be Effectively Addressed Only Through "Collective Action by the National Government."

The first element to be weighed in the balance is the seriousness of the national problem addressed by Congress. The seriousness of the energy crisis that spawned PURPA is sufficiently established to be a fit subject for judicial notice.

The dramatic increase in both petroleum imports and the price of imported petroleum in the seven years preceding Congressional consideration of Section 210 [16] prompted the House Ad Hoc Committee on Energy to warn against the trend toward ever greater imports, observing that "[s]uch an increase in our reliance on oil imports

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[16] Crude oil imports by the United States more than quadrupled, from 1.3 million barrels per day (bpd) in 1970 to 6.6 million bpd in 1977. 2 Energy Information Administration, United States Department of Energy, *1980 Annual Report to Congress* 49 (1981) ("EIA 1980 Annual Report"). As a percentage of total U.S. consumption, imports (mostly from OPEC nations) virtually doubled during the same period, rising from less than a quarter to nearly one-half of domestic consumption. *Id.* at 49. Increases in the price of imported petroleum kept pace with increases in its volume: between 1970 and 1977 the refiner acquisition cost of imported crude oil virtually quintupled, from less than $3 to over $14.40 per barrel, and it would more than double again (to nearly $34) by 1980. *Id.* at 91.

would greatly constrain our foreign policy and could do considerable damage to our economy." H.R. Rep. No. 543, 95th Cong., 1st Sess. 5 (1977). Mindful of the Arab oil boycott some three years earlier, the Committee pointedly noted that "the fundamental problem for U.S. energy is the insecurity of its oil supply." *Id.*

Congress could not long ignore electric utilities as it grappled with the energy crisis and the inflation and other economic dislocations that it engendered. During the 1970's, the generation of electricity accounted for approximately 15% of all oil and natural gas consumed by the nation, *EIA 1980 Annual Report* at 7, 162, and approximately one-third of the electricity consumed in the United States was produced by means of oil and natural gas. *Id.* at 155. Indeed, during the early 1970's generation of electricity was one of the fastest growing segments of the nation's economy. S. Rep. No. 361, 95th Cong., 1st Sess. 32 (1977). Later in the decade, however, electric utilties were plagued by skyrocketing fuel costs, causing higher prices and lagging demand; decreasing efficiency caused by a growing gap between average and peak load and resulting increases in normally idle capacity; higher construction costs; decreasing economies of scale; and reliability problems. *See* H.R. Rep. No. 496 (Pt. 4), 95th Cong., 1st Sess. 129 (1977).[17]

Some state regulatory authorities took steps to ameliorate the energy crisis as it affected electric utilities. Their efforts were hampered, however, by a combination of factors ranging from lack of expertise (many state authorities are woefully understaffed, and depend for both data

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[17] One study concluded that "it is simply a question of time before the inability of the electric utility industry to provide reliable power will become a serious industrial problem leading inevitably to declines in gross national product and increased unemployment." Dow Chemical Company, for the Office of Energy Research and Development Policy, *Energy Industrial Center Study: Executive Committee Summary Report and Policy Proposals* (June 1975).

and analysis largely on the utilities they oversee) to fears that bold action might temporarily threaten their attractiveness to industry. Ultimately, congressional action was required because only Congress could address issues of energy importation, impose the uniform national standards necessary to preclude the undercutting of national goals for local advantage, and prevent individual States from exporting their problems to the detriment of all. As in *Fry* v. *United States*, 421 U.S. 542, 548 (1975), "[i]t seems inescapable that the effectiveness of federal action would have been drastically impaired" if state regulatory authorities had retained the ability to allow utilities to continue to discriminate against QF's.

PURPA was enacted to promote conservation of electric energy and more efficient use of facilities and resources by electric utilities. In Title II, which includes Section 210, Congress expressly recognized the contribution that cogeneration and small power production can make to the cause of more efficient electric generation and reduced reliance upon imported oil. *See* S. Rep. 442, 95th Cong., 1st Sess. 2 (1977). At the time Congress considered Section 210, it was estimated that, if the proper incentives were given, cogeneration by companies such as Great Western and Kerr-McGee could produce 10-14,000 megawatts of electric power by the year 1987, representing 7-10% of the nation's electrical generation capacity.[18] This represents a savings of 200,000 barrels of oil per day.[19] FERC, moreover, has estimated that small power producers such as Windfarms would gene-

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[18] *See* Public Utility Rate Proposals of President Carter's Energy Program: Hearings on S. 1469 Before the Subcomm. on Energy Conservation and Regulation of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 141 (1977) (report of Wm. L. Renfro, Analyst, Futures Research, Library of Congress).

[19] *Id.* at 236 (attachment to statement of David J. Bardin, Dep. Administrator, Federal Energy Admin.). *See also*, GAO, *Report to the Congress*, "Industrial Cogeneration—What It Is, How it Works, It's Potential" 15 (April 29, 1980) ("[T]he most reasonable and likely attainment of energy savings from cogeneration in the year 1985 could be . . . 228,000 to 354,000 [barrels per day] of crude oil equivalent.")

rate 6,000 megawatts of electricity by 1985, thereby further reducing the demand for oil and natural gas.[20] Other estimates of potential QF production are even more optimistic.[21]

In *Fry*, this Court upheld a statute temporarily freezing the wages of state and local employees because it found that the statute was part of a national effort to address six percent inflation, "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." *National League of Cities*, 426 U.S. at 853. The problem addressed by Section 210 of PURPA is at least as serious, and Congress' attack upon it is at least as deserving of state submission.[22]

2. Section 210 Interferes Minimally, if at all, with the States' Freedom to Structure Their Governmental Operations.

National League of Cities, 426 U.S. at 853, identified three attributes of a federal statute which, together with the importance of the federal interest served, legitimize congressional action that might not otherwise survive a

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[20] FERC, Draft Environmental Impact Statement: Rulemaking for Small Power Production and Cogeneration Facilities—Qualifying Status/Rates and Exemptions, Docket Nos. RM 79-54 and RM 79-55, at VII-12 (June 1980).

[21] *See, e.g.*, National Energy Act: Hearings on H.R. 6831, *et al.* Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong. 1st Sess. 324 (1977) (statement of H.D. Butter, operations vice pres., Conoco Coal Development Co.) (Reporting conclusion of Dow Chemical Company study that cogeneration could save the equivalent of 680,000 barrels of oil per day by 1985, and $2-$5 billion per year that would otherwise have to be spent to construct new generating facilities).

[22] Seven years ago this Court upheld a "novel" order designed to increase supplies of natural gas on the ground that the agency that had issued the order, "must be free . . . to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 331 (1974), *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). "That principle," said the Court, "has obvious applicability in this time of acute energy shortage." *Id.*

Tenth Amendment challenge. The statute should be drafted so as to interfere with the States' freedom for only a limited time; it should not "displace . . . state choices as to how governmental operations should be structured;" and it should have a beneficial impact upon state budgets. Section 210 meets these criteria.

As was the case in *Fry*, the means selected by Congress in Section 210 to achieve its objectives were "carefully drafted" so as to interfere minimally with the States' freedom, if not in time at least in manner. Indeed, it is difficult to imagine how Congress might have achieved its goals, the removal of institutional barriers to cogeneration and small power production, in a less intrusive manner.[23]

Second, Section 210 "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves." *National League of Cities*, 426 U.S. at 853. As discussed at pp. 17-19, *supra*, the Section affects the structure of State operations hardly at all.

Third, the Act's effect upon State exchequers will not be substantial.[24] Congress, in particular, authorized $40 million in financial assistance to state regulatory commissions and unrelated utilities to minimize the need for

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[23] Even those major electric utilities that opposed enactment of Section 210, and are now petitioning to overturn the regulations promulgated by the Commission to implement the Section, concede that "[t]he Act carefully circumscribes the Federal Government's role in determining the proper relationships between a utility and its customers. . . . [a] sensitive area which Congress left primarily to the States," and agree that Congress was "carefully conscious" of the "discretion and authority" of the states when it enacted PURPA. Brief for Petitioners at 54-56, *American Electric Power Service Corp.* v. *FERC*, No. 80-1789 (D.C. Cir., case filed July 14, 1980).

[24] "The determinative factor", in any event, is "the nature of the federal action, not the ultimate economic impact on the States . . . [Economic impact], standing alone, is insufficient to establish a violation of the Tenth Amendment." *Hodel*, 49 U.S.L.W. at 4661 n.33.

additional state expenditures to carry out the responsibilities created by Title I and III and Section 210. PURPA §§ 141-42; 42 U.S.C. §§ 6807-08 (Supp. III 1979).

III. EVEN IF THE COURT DOES NOT REVERSE THE DISTRICT COURT'S DECISION IN ITS ENTIRETY, THAT JUDGMENT SHOULD BE REVERSED TO THE EXTENT THAT IT PURPORTS TO DECLARE UNCONSTITUTIONAL THOSE PORTIONS OF SECTION 210 THAT DO NOT REQUIRE THE STATES TO IMPLEMENT FEDERAL RULES.

A. The District Court's Judgment that Section 210 is Unconstitutional Voided Portions of the Statute that Do not Even Arguably "Commandeer" State Regulatory Authority.

The issue raised by appellees below, and the rationale of the district court's judgment, dealt solely with PURPA's alleged infringement of state sovereignty. Only three portions of Section 210, however, have anything to do with state functions or authority. First, Section 210(e)(1) authorizes the Commission to exempt QF's from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities . . . if the Commission determines such exemption is necessary to encourage cogeneration and small power production." Second, Section 210(f)(1) requires state regulatory authorities to implement the rules issued by the Commission for each electric utility for which they have ratemaking authority. Third, Sections 210(h)(2)(A) & (B) permit the Commission and, in certain circumstances, others to bring actions to require state regulatory authorities to implement the Commission's rules. Of these three provisions, the first is unquestionably constitutional; the Commission's authority to exempt QF's from state regulation of utilities flows directly from Congress' power to pre-empt state regulation

of private activities that are in or substantially affect interstate commerce. *See Hodel*, 49 U.S.L.W. at 4660; p. 14, n.11, *supra*.

The remainder of Section 210 deals with purely federal matters: the issuance by FERC of rules articulating and implementing the federal policy that cogeneration and small power production are to be encouraged (Section 210(a)-210(d)), the implementation of these rules by nonregulated utilities (Section 210(f)(2)), and the exemption of QF's from parts of the Federal Power Act and the Public Utility Holding Company Act (Section 210(e)). Neither the arguments raised by Mississippi nor the district court's rationale addresses these provisions at all, although they were apparently struck down by the court's sweeping decree.

Neither Mississippi nor the district court attempted any attack on the federal portions of Section 210, and none is possible.[25] Accordingly, although we believe that Section 210 is constitutional in its entirety, even if the Court were to void some portions of the Section, it would be appropriate to sever the invalid portions and reverse the district court as to those portions that do not even arguably "commandeer" state regulatory authority. *See Hodel*, 49 U.S.L.W. at 4660.

B. When Part Of A Statute Is Deemed Invalid, The Court Can Sever The Invalid Part And Uphold The Balance.

The test for severance is well established:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

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[25] As demonstrated above, there can be no doubt that Congress had the power under the Commerce Clause to enact Section 210. There is also no doubt that Congress had a rational basis for carefully crafting the statute as it did in order to deal with the perceived impediments to the development of QF's.

Champlin Refining Co. v. *Corporation Commissioner*, 286 U.S. 210, 234 (1932). In recent years when statutes (particularly federal statutes) have been challenged as unconstitutional, the Court has shown a marked preference for severing those portions it finds invalid and upholding the balance. *See, e.g., United States* v. *Jackson*, 390 U.S. 570, 585-87 (1968); *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971); *Buckley* v. *Valeo*, 424 U.S. 1, 108-09 (1976) (per curiam).[26]

The cases on severance suggest a three part inquiry. First, does anything in the statute or legislative history suggest that the legislature would not have enacted the valid provisions independently of those to be struck down? *See Champlin Refining Co.*, 286 U.S. at 234; *Tilton*, 403 U.S. at 684. Second, after the unconstitutional provisions are eliminated, is the remainder "fully operative as a law?" *Id.* Finally, does severing the invalid portion alter the substantive reach of the legislation? *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Jackson*, 390 U.S. at 586; *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).[27] As explained below, the answers

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[26] The only recent cases in which the Court has refused to sever involved state statutes and what can fairly be characterized as extreme or exceptional situations. In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court held unconstitutional an article of the Texas Penal Code that exempted from criminality *only* abortions performed for the purpose of saving the mother's life; severance in that instance would have left Texas with a statute proscribing abortions in *all* circumstances. 410 U.S. at 166. And in *Sloan* v. *Lemon*, 413 U.S. 825 (1973), the Court struck down (on First Amendment Establishment Clause grounds) a state statute providing assistance to parents who sent their children to "nonpublic schools," and refused to treat the law as having a separable provision for aid to parents of children attending nonsectarian "nonpublic schools" because the statute nowhere distinguished between sectarian and nonsectarian nonpublic schools and "to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." 413 U.S. at 834.

[27] While early cases focused on the presence or absence of a severability clause in the statute being construed, the Court has

to these questions in the present case are such that severance is appropriate should the Court void any part of Section 210.

C. Severance Is Appropriate In This Case.

Applying the severability test to Section 210, the Court should sever any provisions that it finds impermissibly infringe on state authority and uphold the remainder. Although severance would produce a pared down Section 210, what remains would be "fully operative as a law" and would further the statutory goals of PURPA without distorting Congress' intent.[28]

As discussed above, the statute and its legislative history establish that the purpose of Section 210 is to encourage cogeneration and small power production by requiring utilities to deal fairly with QF's and by lifting from QF's the burden of utility-type regulation. *See* Section 210(a); S. Rep. No. 1292, 95th Cong., 2d Sess. 98 (1978). After severance of those portions even arguably subject to Tenth Amendment challenge, Section 210 would still enunciate a federal policy of encouraging

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more recently noted that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *Jackson*, 390 U.S. at 585 n.27. Like *Jackson*, where the Court severed despite the absence of a severability clause, PURPA has no such clause.

[28] Section 210 itself is severable from the rest of PURPA and from the rest of Title II. PURPA is in fact a conglomeration of separate statutes, and each substantive title is only loosely related to the others. The invalidity of Title I or III or portions thereof should not, therefore, affect Section 210. Even within Title II, Section 210 stands independently. Most sections of the title are amendments to Title II of the Federal Power Act (FPA). Sections 205, 209, and 210 do not amend the FPA, however, and so stand apart from the rest of Title II of PURPA (and from each other). Only Section 210, and a few definitions in Section 201, address cogeneration and small power production, although Sections 202 and 204 (added to the FPA as Sections 210 and 212) provide an alternative procedure to that set out in Section 210 whereby QF's and utilities may be directed by FERC to interconnect with each other.

cogeneration and small power production and would continue to empower the Commission to implement important aspects of that policy.

First, the Commission could continue to issue rules binding on nonregulated utilities, which provide a substantial portion of the available electric generation and distribution capacity in many areas of the country. These utilities would still be required to buy power from QF's for a price not greater than their full avoided costs and to sell QF's back-up and supplementary power at non-discriminatory rates.

Second, even if the provisions of Section 210 requiring that States issue rules to implement federal guidelines were stuck down, FERC's power under Section 210(e) to exempt QF's from state regulation and from the Federal Power Act, 16 U.S.C. § 824, *et seq.* (1976 & Supp. III 1979) ("FPA") and the Public Utility Holding Company Act, 15 U.S.C. § 79 *et seq.* (1976 & Supp. III 1979) ("PUHCA"), would be left standing after severance. These exemptions from state and federal regulation provide substantial assistance to QF's who can find a market for their electrical output even absent PURPA's requirement that the States direct the utilities they regulate to offer to buy the power. While many utilities have historically proven unwilling to purchase power from QF's at a reasonable rate, others have not. Moreover, some states have enacted, or can be expected to enact, requirements similar to those in Section 210 and the Commission rules, even without a Congressional mandate.[29] Accordingly, QF's built or developed by companies like Windfarms, Kerr-McGee, and Great Western, who can find a market for their output in some jurisdictions by means of contracts with willing utilities[30] or by

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[29] *See, e.g.*, Cal. Public Utilities Commission Decision 91109, O.I.I. No. 26 (Dec. 19, 1979), requiring Pacific Gas and Electric to publish its full avoided capacity and energy costs and authorizing purchases of power from cogenerators at rates equal to those costs.

[30] Hawaiian Electric Co., for example has already entered into a contract to purchase the power that will be generated by Wind-

virtue of requirements imposed on utilities by state authorities, require only exemptions from State regulation, the FPA and the PUHCA to thrive in those jurisdictions.[31]

Nothing in the legislative history of PURPA suggests that Congress would not have enacted those portions of Section 210 that would remain after severance if it could not have enacted the more comprehensive regulatory scheme embodied in Section 210 as written. To the contrary, there is considerable discussion in the legislative history of the advantages of exempting QF's from utility type regulation, for example, apart from any mention of the need for state rules requiring utilities to buy their power.[32]

In sum, even if this Court accepts the reasoning of the district court, the portions of Section 210 that would be

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farms' Kahuku project, and Pacific Gas and Electric has signed a letter of intent to buy the output of Windfarms' Solano County project. Similarly, the Clark County Public Utility District has agreed to buy the output of Great Western's Vancouver generation facility.

[31] Indeed, even absent the power conferred upon FERC to grant exemptions from State laws, the exemption from federal regulation could and would stand alone, encouraging cogeneration and small power production. Several states have independently exempted QF's from state regulation as utilities. Hawaii, for example, has enacted legislation exempting small power producers from state regulation as public utilities, Ha. Rev. Stat. § 269-1 (Supp. 1981), and California has enacted provisions that exempt from state regulation as public utilities persons generating electricity for sale to utilities by means of other than "conventional sources." *See* Cal. Pub. Util. Code §§ 216(d), 218, 2801-24 (West Supp. 1981).

[32] See, e.g., 123 Cong. Rec. S13,212 (daily ed. Aug. 1, 1977) (remarks of Sen. Percy); *id.* at S16,398 (daily ed. Oct. 5, 1977) (remarks of Sen. Hart). National Energy Act: Hearings on H.R. 6831, *et al.*, Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 337 (1977) (statement of Gerald L. Decker, Corporate Energy Manager of the Dow Chemical Company). There is also discussion in the legislative history of the advantages to QF's of exemption from federal regulation quite apart from any mention of exemption from state regulation. 123 Cong. Rec. S16,473 (daily ed. Oct. 6, 1977) (remarks of Sen. Durkin).

left standing after severance—authorizing rules governing nonregulated utilities and granting FERC the power to exempt QF's from certain state and federal regulation —would be "fully operative as a law" and would not distort Congress' intent. Accordingly, should the Court decide that Section 210 infringes state authority, as found by the district court, it should not invalidate the Section in its entirety but should sever those portions that arguably "commandeer" state regulatory authority and reverse the district court as to the remainder.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed in its entirety. Should the Court believe that Section 210 of PURPA is inconsistent with the Tenth Amendment insofar as it mandates state implementation of FERC rules, the objectionable portions of the Section should be severed, and the judgment of the district court reversed to the extent that it purports to invalidate those portions of Section 210 that are constitutionally unobjectionable.

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